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David Benavides

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THE SOCIAL COSTS OF MOVING WATER IN NORTHERN NEW MEXICO

David Benavides, Esq.

Community and Indian Legal Services of Northern New Mexico

Water and Growth in the West

June 6-9, 2000

**NATURAL RESOURCES LAW CENTER
University of Colorado
School of Law
Boulder, Colorado**

The Social Costs of Moving Water in Northern New Mexico

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I. Introduction:

Conflict occurs in northern N.M. over water because of the narrowness with which many of the participants view the nature of the conflict.

- A. The problem is never just a matter of adjudicating correctly a single water right, or whether a particular proposed water right transfer should be approved, etc.
- B. Added to the specific event is the whole context of where many of these senior water rights are located, and what water represents to those communities, symbolically and otherwise:
 - 1. Communities that have for centuries been rooted in a specific place and resource base
 - 2. Communities for which long-existing water uses are part of a cultural identity, and loss of control over water is perceived as an infringement on the culture and the cultural values
 - 3. Communities that are accustomed, through institutions like the acequias, to playing a strong management role in water use
 - 4. Communities that have been deprived of resources in the past, or had them taken away, through the legal system
 - 5. Communities where poverty and lack of opportunity is a significant problem, at some of the worst levels in the country
 - 6. Communities whose functioning irrigation systems are one thing they still have intact, although they are highly vulnerable to the effects of transfers because they are dependent on dues and volunteer labor and governance
 - 7. Communities where in recent history economic forces are seeking to remove resources to developing areas, foreclosing future use of those resources by the community
- C. This context is not necessarily a bad thing, however. Policymakers and we as a society should perhaps see it as a good thing, for example, that some of the most senior water rights are found in poor communities rather than well-off communities. Perhaps, somehow, having these water rights will make these

communities better able to survive as communities as well as culturally. Can the fact that some of the poorest people in the state possess some of the most valuable water rights in the state translate into a future that is not one of poverty for these communities? The demand for this water is perhaps a rare opportunity to address several significant problems at once...

II Historical Background

- A. Since 1848, under American law, the evolution of water rights tenure in communities in northern N.M. has taken various paths, with Pueblo and tribal rights evolving under federal law and non-tribal, acequia-based rights evolving under state law.
- B. The most significant consequence of this in terms of modern-day water rights transfers was the different ways in which the *common-property* or *community-control* aspects of water rights were ultimately manifested in law.
- C. For Indian tribes and Pueblos, federal law vested the ownership of the water rights in the tribe itself (held in trust by the federal government). Because tribal water rights are not owned by the individual members that use them, they are not subject to alienation from the tribe or from tribal lands by any individual action. A potential buyer or leasor of water rights must negotiate with the tribe. (Subject to the present state of uncertainty in terms of the ability of tribes to market their water rights by transferring them outside of tribal lands.)
- D. State law was more ambivalent about the tenure of non-tribal water rights under acequias.
 1. Under Spanish and Mexican legal custom, the acequia was constructed by the community, belonged to the community and existed to serve that community. The individual's right to use the water derived from residence in the community and having irrigable cropland, along the acequia. As a general rule, if the person moved, the water-use right remained with the land and belonged to the new person who took up residence on that property.
 2. American law maintained the common property tenure of the acequia itself. (NMSA 1978, § 73-2-7 provides that acequias are tenancies-in-common. *Olson v. H & B Properties, Inc.*, 118 N.M. 495, 882 P.2d 536 (1994); *Snow v. Abalos*, 18 N.M. 681, 140 P. 1044 (1914)). Acequias are also recognized political subdivisions of the state. (NMSA 1978, § 73-2-28)

3. However, early court decisions under American jurisdiction made it clear that the *water rights* under the acequia were now privatized to an extent unknown under the prior sovereigns (*Snow v. Abalos*, 18 N.M. 681, 140 P. 1044 (1914)).
4. The most foreign aspect of this privatization was the ability of an individual water right owner to sever the water right from the land and permanently transfer the water right out of the community system without the permission or concurrence of the community. (NMSA 1978, §§ 72-5-23 and 24.) This was antithetical to the entire concept of the acequia: i.e., that settlers built the acequia so that a community could come into existence; that the water rights only existed because of the efforts the community put into constructing the acequia in the first place; and that the community didn't undertake this huge laborious task just to have it able to be dismantled piecemeal at the whim of the individual residents. The ability of an individual to transfer acequia water rights out of the community was a triumph of individual rights over community rights.

E. So the tribal and acequia systems of water rights tenure ended up very dissimilar under American law, not based on any great dissimilarity between the Spanish/Mexican legal traditions vs. Pueblo legal traditions (both giving respect to the notion of water as a common or community resource), but rather upon the way in which American law has been differently applied to those traditions.

II The Conflict Today: The Statutory Framework

- A. To the extent that water rights tenure in N.M. has evolved to resemble that of other Western states, N.M. finds itself on a trajectory similar to neighboring states and other states in the west, i.e., growing conflict over proposed transfers between development interests/municipalities and long-established rural communities. (E.g., Owens Valley, Cal., Arkansas River Basin, Col., "water ranching" in Ariz.)
- B. The statutory framework is pretty typical
 1. Despite the more privatized nature of a water right, a water right transfer under New Mexico law is not entirely a private transaction.
 2. There are statutory provisions for notice by publication of the proposed transfer. (NMSA 1978, §§ 72-5-23 and 24 and §§ 72-5-3 through 5)

- a. Note, however, that in cases where the water rights of others may be affected by a proposed transfer, and where the identity and whereabouts of those affected can be reasonably ascertained, notice by publication is probably constitutionally insufficient, even though it is all that is required by NMSA 1978, §§ 72-5-23 and 24. See, e.g., *Uhden v. New Mexico Oil Cons. Com'n* 112 N.M. 528, 817 P.2d 721 (1991), citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

4. Affected citizens may file objections and bring the matter to an administrative hearing. (NMSA 1978, §§ 72-5-23 and 24 and §§ 72-5-3 through 5)

5. A proposed transfer must be denied if it is determined that it would *impair other water rights*, or that it is *contrary to the conservation of water in the state*, or that it is *detrimental to the public welfare of the state*. (NMSA 1978, §§ 72-5-23 and 24 and §§ 72-5-3 through 5)

- a. The burden of proof as to these issues is on the applicant. (*City of Roswell v. Berry*, 80 N.M. 110, 452 P.2d 179 (1969); *Mathers v. Texaco*, 77 N.M. 239, 421 P.2d 771 (1966); *McBee v. Reynolds*, 74 N.M. 783, 399 P.2d 110 (1965)).

IV “Public Welfare” and “Win-Win” Policies

- A. In theory, the “public welfare” portion of a water right transfer proceeding is where the critical needs of the acequia system and the move-from community can be presented and meaningfully weighed within the modern statutory framework. In New Mexico, however, “public welfare” has not been more specifically defined in statute or regulation.
- B. The emerging notion of “environmental justice” (see, e.g., Executive Order 12898, February 11, 1994) in natural resource management provides some appropriate criteria for analyzing the public welfare in northern N.M. transfers. When faced with a natural resource management issue that potentially impacts poor communities, it is desirable from a policy standpoint to resolve that issue in a way that does not make the communities worse off, or even benefits them if possible. Policy makers and decision makers, particularly in a region with the

type of serious poverty problem as northern N.M., should look for alternatives that both achieve the management objectives of the agency in terms of sustainable resource use and the needs of poor communities.

1. The Federal Sustained-Yield Unit Act is an example of this applied to national forest policy.

C. Transfers or transactions relating to water rights that have been portrayed in the literature as win-win:

1. Imperial Irrigation District (IID) and Metropolitan Water District of (MWD) Southern California. A municipality subsidizes conservation measures in an irrigation district (canal lining), and the irrigation district in turn leases the conserved water to the municipality for 35 years.
2. Intermountain Power Project (Utah). The irrigators form a unit for purposes of negotiating the sale of water rights. Two-thirds of the water rights sold are leased back because they are not needed by the power plant. Relatively little land is taken out of production. The community benefits from water remaining in area of origin, and the resulting increase in the tax base. The purchase money, which accrues to a large number of individuals who actually remain in farming, is used to further boost the agricultural economy.

D. These examples gives us some ideas as to public welfare criteria in a given proposed transfer:

1. Does only one person benefit in the move-from community or do many people?
2. Is whatever benefit occurs a one-time benefit or does benefits recur over time?
3. Is the water right severed from the community or does ownership remain in the community?
4. Is the new economic activity flowing from the water right occurring in the community or is it removed from the community?
5. Does the transaction contribute to the economic development of the community or does the transaction perpetuate, or even worsen the state of underdevelopment that existed?
6. Is agricultural land taken out of production or not?
7. These questions raise contemporary notions of rural economic development: that development cannot be highly dependent on external

forces; that development is not really occurring if poverty and underdevelopment persist, i.e., if the benefits are not equitably felt, even though you can point to lots of transactions taking place; that local economies need to be regenerative rather than of a one-time or sporadic nature; that it's essential for local economies to maintain their renewable resource base.

E. The fourteen-year-old state district court *Sleeper* decision remains the most determined attempt by a judge or a hearing examiner to articulate and weigh the competing public welfare considerations in the case of acequia water rights.

1.

In re Application of Howard Sleeper, Rio Arriba County Case No. RA 84-53(C), slip op. (New Mexico First Judicial District, April 16, 1985), *rev'd, Ensenada Land & Water Ass'n. v. Sleeper*, 107 N.M. 494, 760 P.2d 787 (Ct. App. 1988). In this case local acequias appealed an OSE hearing examiner approval of the transfer of 75 acre-feet of acequia water rights to a resort development. In a *de novo* review, the district court judge weighed the economic benefits of the proposed resort against the effects of transferring the water rights out of the acequia system. After citing evidence given in the hearing that "such development creates few jobs for local inhabitants except at menial levels" and that "[m]ost other locals never realize any particular benefit from the resort economy", the judge denied the transfer application based on the following analysis:

"Northern New Mexicans possess a fierce pride over their history, traditions and culture. This region of northern New Mexico and its living culture are recognized at the state and federal levels as possessing significant cultural value, not measurable in dollars and cents. The deep-felt and tradition-bound ties of northern New Mexico families to the land and water are central to the maintenance of that culture.

"While these questions seem, at first, far removed from the simple question of the transfer of a few acre-feet of water, the evidence discloses a distinct pattern of destruction of the local culture by development which begins with small, seemingly insignificant steps.

"I am persuaded that to transfer water rights, devoted for more than a century to agricultural purposes, in order to construct a

playground for those who can pay is a poor trade indeed...”

1. That decision, however, was reversed on appeal because it improperly applied a public welfare analysis prior to the incorporation of the public welfare criterion into the statute in mid-1985, so the case is not binding in any sense on these issues.

B. In New Mexico, a real effort at a public welfare analysis is almost never done, and the transfers, not surprisingly, are nearly all on the bottom of the spectrum. At the Office of the State Engineer (OSE) administrative hearing stage, where all of these cases are decided in the first instance, the hearing examiner decisions have a sort of inconsistent, *ad hoc* and superficial quality in their treatment of the “public welfare” issue. (Susanne Hoffman-Dooley, Note, *Determining What is in the Public Welfare in Water Appropriations and Transfers: The Intel Example*, 36 Nat. Resources J. 103 (1996)). Typically there is no public welfare analysis if the application is denied on some other ground. What mention is made of public welfare considerations in written decisions tends to lack the type of depth found in the *Sleeper* analysis. Acequia communities feel justifiably that the OSE is disdaining the very provision in the statute that could protect them.

V. Opportunities for Decision-Makers

Incorporating standards of environmental justice into decision-making will require that decision-makers perceive matters that come before them as opportunities to achieve several desirable policy objectives simultaneously.

A. For example, the OSE is aware that the statute mandates a *public welfare* analysis, but the office has been resisting it since it was incorporated into the statute in 1985. If on the other hand, the OSE were to develop criteria such as that set forth in section IV.D. above, to use in their public welfare analysis, there would be a strong incentive for applicants seeking water rights to collaborate with the move-from community and try to move up the scale prior to applying, rather than risk denial of their application. Water transactions would begin to take on the character of *partnerships* between poor communities that have water rights and entities that need water, such as was seen in the IID and IPP examples above.

1. In addition to all the other the benefits of promoting such partnerships, the agency (as well as the parties) would benefit by not having to expend resources presiding over litigation

2. In situations where *water salvage* may play an important

role, the OSE must be able to accept that water conservation measures can lead to new consumptive uses, so long as return flows to downstream users are not diminished. In other words, to the extent that the new consumptive uses are using water that would have been lost to the stream system ("incidental depletions") and not available at all downstream, it would be sound policy to allow those losses to be converted to beneficial uses.

- a. This is the type of incentive that made the IID agreement a reality; i.e., MWD invested in costly ditch-lining only under an assurance that MWD would receive the conserved water through its lease with IID.
- b. In the case of an acequia, the creation of conserved water by the reduction of conveyance losses in the acequia would become the first transferable *community water rights* (non-individual water rights) cognizable within an acequia under American jurisdiction. Such rights would tend to be managed for broader community benefits, rather than an individual benefit.
- c. There is the added benefit that the new use can be supplied without taking lands out of agricultural production

II Water Banking

A water bank is any of several possible legal mechanisms by which an entity holds and manages water rights owned by others or historically used by others. Within that broad definition is an array of possibilities in terms of arrangements to convey, lease or assign water rights into or out of the bank, how the banking entity may manage or use or reallocate the banked water, who decides how to manage the banked water, etc.

- A. A water banking system may be a purely *private system* that simply uses *mechanisms already existing in statute* (such as water-leasing).
- B. In some states (although not New Mexico) there is *statutory authority for water banking* that confers specific powers on the water banking entity or a special status for the banked water rights, such as shielding them from forfeiture if the bank does not put them to use. (See, e.g., Idaho Code § 42-1761)
- C. Although not usually referred to as water banks, many water districts in New Mexico have *inherent statutory powers to direct the reallocation of water use* within and outside of their boundaries. Irrigation districts in New Mexico are an example. (See NMSA 1978, § 73-13-4, § 73-9-14, § 73-10-17.)

- D. There can also be combinations of these mechanisms. For example, the proposed Middle Rio Grande Conservancy District's (MRGCD) water bank would be a blending of existing general statutory provisions (e.g., OSE jurisdiction over surface-to-groundwater transactions) in combination with special statutory allocation authority provided for conservancy districts.
- E. There is an emerging interest by acequias in water banking, not as a means to market water rights out of the community, but rather as a means to have some affirmative role in the preservation of water rights within the local area and the reallocation of water use in their local areas. Acequias are at a relative disadvantage in this sense. Most other water-managing entities in New Mexico already enjoy some kind of legal ability to guard against the erosion of their water rights base.
1. *MRGCD* owns a large quantity of post-1907 vested water rights initiated under its OSE permit, which are not subject to alienation by an individual water user.
 2. *Irrigation districts* have the statutory authority to set terms and conditions for the reallocation of water rights within and outside of the district. Under this authority, Elephant Butte Irrigation District has approved the reallocation of certain agricultural water rights to the City of Las Cruces, but those rights are not alienated from the District and remain under the District's jurisdiction.
 3. The water rights of *municipalities, counties, state universities, member-owned community water systems and public utilities supplying water to municipalities or counties* may be held unused for a forty-year planning period without penalty or loss for non-use, a type of "banking" capacity. (NMSA 1978, § 72-1-9) *Conservancy district* water rights, once vested, may be retained by the district without being lost for non-use. (NMSA 1978, § 73-17-21). Tribal water rights are not subject to state-law doctrines of forfeiture or abandonment, and so may be held unused by tribes without loss until needed.
- F. Because acequias and the water rights under them have none of these protections, they find themselves in an ironic position. Their interest in water banking is not out of any interest in water marketing, but rather something very different, i.e., in preserving the agricultural and water base of acequia communities. Yet they lack the legal tools to be able to do this as easily as other entities can. This lack of

legal protections in turn makes acequias among the most vulnerable of water entities to the marketing of water rights and their exportation from the community. So it is that the water institution with one of the clearest historic traditions of common ownership and management of water is one of the most defenseless to prevent the movement of water rights out of the community. The task of designing an effective legal "water banking" mechanism is a formidable challenge facing acequias today.

- G. Another irony is that the only water banking proposals that have been considered in recent years are legislative bills that, if enacted, would have had the potential to promote water marketing on a large geographic scale. These bills proposed a new state governmental agency that would administer all water banking activities in the state, and would have pre-empted water banking by other water entities. Clearly this was not the type of water banking that acequias wanted to see. (See Attachment, Resolution of the New Mexico Acequia Association.) The bill has died at the committee level in both the House and the Senate.

RESOLUTION OF THE NEW MEXICO ACEQUIA ASSOCIATION

Opposing the New Mexico Water Banking Act in its present form, which by providing a "market conduit" for the release of water rights from "low-value uses ... to high-value applications" would facilitate the free market transfer of water rights, could potentially transfer water rights out of watersheds or acequias of origin, and could diminish an acequia community's ability to determine how water should be used and allocated.

WHEREAS:

1. Acequias are local self-governing institutions that by tradition and custom have managed water resources at the local level for centuries.
2. Local, community-based control of water management is essential in planning for the future economic development of New Mexico's rural communities.
3. The state water transfer statute in its "conservation" and "public welfare" clauses, recognizes the cultural and environmental value of water in addition to the economic value.
4. Acequia systems have used water resources sustainably for centuries and have provided important ecological benefits such as riparian habitat and aquifer recharge.
5. The New Mexico Water Banking Act creates a statewide water bank which would "provide a market conduit" at the statewide level for the transfer of water rights by sale or lease and creates a New Mexico Water Bank Board appointed by the governor.
6. The Act would facilitate the "free market" transfer of water rights and would emphasize the "commodity" value of water rights while overlooking the community value of acequias.
7. Such proposals could serve to sever ties between water rights and traditional communities by facilitating transfers toward those who have the resources to purchase water rights.
8. Transfer of water rights out of areas-of-origin threatens the future economic viability and environmental sustainability of acequia communities.
9. Transfer of individual water rights by severing water rights from appurtenant land adversely affects the acequia's ability to function efficiently.
10. A variety of water banking arrangements already exist in New Mexico at the regional level
11. By custom and tradition, acequias have made water-pooling arrangements and have made internal reallocations in much the same way for centuries.
12. The proposed New Mexico Water Bank Authority, as a governor appointed board from around the state, is not the appropriate mechanism for determining water banking arrangements.

13. The proposed New Mexico Water Bank Authority is not the appropriate decision-making body to make judgements about "low-value" versus "high-value" uses, whether water is "surplus to customary ... uses, or what constitutes the "public interest".
14. The New Mexico Water Banking Act makes no mention of impairment, conservation, or public welfare tests for transfers nor does it provide an adequate definition of "Water Banking."
15. Water banking arrangements are more appropriately conducted at the local and regional level.

Now therefore be it RESOLVED by the membership of the New Mexico Acequia Association

1. The Association OPPOSES passage of the New Mexico Water Banking Act in any form which would create a statewide New Mexico Water Bank or a New Mexico Water Bank Board.
2. The Association OPPOSES any effort to streamline free market mechanisms that would make it easier to transfer water rights out of acequias.
3. The Association OPPOSES efforts to transfer water rights without the consent of acequias when such transfers would adversely affect the acequia's ability to function.
4. Copies of this resolution shall be provided to the House of Representatives Agriculture and Water Resources Committee and the Senate Conservation Committee of the New Mexico Legislature, the Water and Natural Resources Interim Committee, the State Engineer, and the New Mexico Acequia Commission.

Adopted at the annual membership meeting of the NMAA, December 12, 1998, Northern New Mexico Community College in Espanola, NM. Passed unanimously.

Antonio Medina, President

Harold Trujillo, Vice President

City of Santa Fe Supports Rural-Urban Connections

The City of Santa Fe strongly supports initiatives and programs which recognize and promote the social and economic links between the city and the surrounding rural communities. Santa Fe has historically served as a political, social and economic center for the region, and will continue to do so in the future. The Community Economic Development Plan, adopted by the City Council in 1996, promotes a regional approach to community based development, specifically citing agricultural products and furniture makers as target industries.

The challenges facing the rural communities of northern New Mexico are complex and often inter-related. Loss of agricultural lands and access to forest resources impact the ability of communities to support their social ties and cultural identities. Poverty rates are unacceptably high, and a great many residents rely on traditional agricultural resource based activities to support their families. Preservation of water rights, acequia systems, small scale sustainable farming and forest based activities are crucial to the health of the rural communities. More modern activities such as arts, crafts and tourism (in appropriate scope and scale) offer opportunities for both rural and urban residents. The health of Santa Fe is intrinsically tied to the health of its rural relatives,

The City encourages efforts to obtain funding for efforts to protect water rights and acequias. We support efforts to protect and encourage sustainable agriculture, both through programs at the farm level and in developing markets for the farmers' production. We support sustainable forestry operations and developing value added products from the forest resources such as furniture and architectural products. We support sustainable livestock production, both for market and for personal consumption. We believe that these efforts need to be undertaken in a broad context which recognizes and supports related endeavors. Wherever possible, these efforts should be collaborative rather than competitive. This does not mean that there should be a central coordinating body to direct all efforts. It does mean that people need to talk to each other about what they are doing and support each others efforts.

Developing links to the urban markets are crucial to the success of rural development efforts. Forestry programs must have a market for their furniture and vigas. Farmers cannot increase or sustain production without urban customers willing and able to pay a fair price for their produce and farm crafts. Rural studio and farm tours need urban visitors to patronize their activities. Sustaining and strengthening these links requires the development of an infrastructure to support their activities. A Water Bank is needed to protect rural and urban water rights. The farmers' markets of the region need improved facilities if they are to achieve their potentials. Production, storage and distribution facilities for agricultural, livestock and forestry endeavors are inadequate in the rural communities throughout the region. Tourism is over-concentrated in Santa Fe, but regional collaboration could spread the benefits and opportunities throughout the region if the facilities to accommodate visitors are adequate. In each case, careful attention to maintaining an appropriate scale is crucial to obtaining a balanced development effort.

Funding proposals, whether to government, foundation or other sources, should clearly show how the particular proposal fits into a comprehensive, regional approach. Every proposal cannot (and shouldn't) attempt to address every issue, but they should clearly recognize their connections and show that they are linked to the other steps from production to final marketing. For example, a milling operation must have a sustainable source of trees and a demonstrated market for its products. An enlarged farmers' market must have enough farmers to fill its stalls, enough related year-round users to justify the capital investment and a marketing program to bring in customers for its vendors. The farmers must have reliable water in their acequias in order to increase production to take advantage of the improved marketing opportunities. Feasibility studies, financial

projections and budgets must be realistic, with assumptions clearly stated and defensible.

The City of Santa Fe has demonstrated a policy of supporting sustainable community based, regionally oriented development efforts through the adoption and implementation of the Community Economic Development Plan. We look forward to working collaboratively with all others who share these values.